

No. 19833

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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RECOLD CORPORATION,  
a corporation, and  
LESTER K. QUICK,

*Appellants,*

*vs.*

DAVID A. NURSE, dba  
DAVID A. NURSE COMPANY, and  
HUGH ROBINSON & SONS, a  
corporation,

*Appellees.*

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## APPELLANTS' REPLY BRIEF

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## Subject Index

	Page
The patent art relied upon does not disclose the Quick invention.....	6
There is no adequate proof that surge tanks were ever used	14
The purported dilemma of without substantial evaporation....	15
Conclusion.....	17
Certificate of counsel	

Table of Cases

	Page
Aetna Steel Products Corporation v. Southwest Products Company, 282 F. 2d 323 (C.A. 9, 1960).....	2, 18
Amerio Contact Plate Freezers, Inc. v. Belt-Ice Corporation et al., 316 F. 2d 459 (C.A. 9, 1963).....	12
Andrews v. Hovey, 123 U.S. 267.....	12
Barbed Wire Patent Case, 143 U.S. 275.....	14
Carnegie Steel Company v. Cambria Iron Company, 185 U.S. 403.....	3, 7
City of Milwaukee v. Activated Sludge, 69 F. 2d 577 (C.A. 7, 1934).....	3
Diamond Power Specialty Corporation v. Bayer Co., 13 F. 2d 337, C.A. 8 (1926).....	8
Elizabeth v. Pavement Co., 97 U.S.C. 126.....	12
Fermentation Co. v. Maus 122 U.S. 413.....	3
Filtex Corporation v. Amen Atiyek, 216 F. 2d 443 (C.A. 9, 1954).....	6
Gordon Form Lathe Co. v. Walcott Mach. Co., 32 F. 2d 55, C.A. 6 (1929).....	8
Hummer (In re), 113 USPQ 66, 241 F. 2d 742 (1957)....	8
Killefer Mfg. Co. v. Dinuba Associates, Limited, 67 F. 2d 362 (C.A. 9, 1933).....	9
Loom Co. v. Higgins, 105 U.S. 580.....	7
National Sponge Cushion Co. v. Rubber Corporation, 268 F. 2d 731, C.A. 9 (1961), 128 USPQ 320.....	12
Naylor et al. v. Alsop Process Co., 168 F. 911, C.A. 8 (1909).....	8
Oliver United Filters, Inc. v. Silver, 206 F. 2d 658 (C.A. 10, 1953).....	3
Payne Furnace & Supply Company, Inc. v. Williams-Wallace Co., 48 USPQ 575, 117 F. 2d 823, C.A. 9 (1941), Cert. denied, 49 USPQ 756, 313 U.S. 573, 85 L. Ed. 1530.....	8, 17

	Page
Peters (H. W.) Co., Inc. v. MacDonald, 59 F. 2d 974, C.A. 2 (1932), Cert. denied 287 U.S. 659, 77 L. Ed. 569 (1932).....	8
Pointer v. Six Wheel Corporation, 177 F. 2d 153 (C.A. 9, 1949).....	2, 18
Risdon Iron and Locomotive Works v. Medart, 158 U.S. 68.....	3
Safety Car Heating & Lighting Co., Inc. v. General Electric Co. et al., 155 F. 2d 937, C.A. 2 (1946).....	18
Silver-Brown Co. v. Sheridan et al., 71 F. 2d 935, C.A. 1 (1934), Cert. denied 293 U.S. 590, 79 L. Ed. 685 (1934).....	8
Smith and Griggs Mfg. Co. v. Sprague, 123 U.S. 249 (1887).....	12
Steiner Sales Co. v. Darman Mfg. Co., Inc. et al., 33 F. Supp. 422, D.C. N.Y. (1940).....	8
Trabon Engineering Corporation v. Dirkes, et. al., 136 F. 2d 24, C.A. 6 (1943).....	7
Trico Products Corporation v. Apco-Mossberg Corporation, 45 F. 2d 594, C.A. 1 (1930).....	8
Troy Company v. Products Research Company, 339 F. 2d 364.....	6
Walch (In re) et al., 87 F. 2d 511 (C.C.P.A. 1937).....	3
Wham-O-Mfg. Co. v. Paradise Manufacturing Co., 327 F. 2d 748 (C.A. 9, 1964).....	2, 18
Williams Iron Works Co. v. Hughes Tool Co., 109 F. 2d 500 (C.A. 10, 1940).....	10
Young Radiator Co. v. Modine Mfg. Co., 55 F. 2d 545, C.A. 7 (1932).....	8

#### Statutes

35 U.S.C. § 120.....	10
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**APPELLANTS' REPLY BRIEF**

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Appellees, in their brief, rely almost exclusively upon the assertion that a "trap" is old. This assertion is immaterial and in no way determinative either from a standpoint of fact or law in this action. The claims in issue are (1) a method claim which provides:

"1. A method of operating and defrosting refrigerating apparatus comprising, the steps of; compressing a gaseous refrigerant, passing said compressed refrigerant gas through an evaporator to defrost the same, withdrawing gas and condensed liquid from said evaporator, collecting said condensed liquid in a body, establishing a stream of said withdrawn gas and directing said stream to flow away from said body of liquid from a point there-



above, metering liquid from said body into said stream flowing away from said body at a predetermined rate, and without substantial re-evaporation of the said liquid and re-compressing said stream of gas and liquid to repeat said cycle.”

and (2) apparatus or combination claims 2, 3, 4, 5, and 8, claim 4, for example, which provides:

“4. In a refrigerating apparatus, a compressor, a condenser for condensing compressed gas to a liquid, an evaporator connected to said condenser through expansion means, a by-pass means for selectively conducting compressed gas from said compressor to said evaporator for defrosting the same, a return line from said evaporator to said compressor, a trap in said return line and comprising a closed chamber, said return line having an inlet leg and an outlet leg in said chamber, each of said legs having an open end in said chamber above the bottom thereof, a metering conduit in said chamber having one end thereof adjacent the bottom of said chamber and extending upwardly therefrom with its other end extending into said outlet leg and facing in the direction of gas flow therein whereby any liquid refrigerant in the bottom of said chamber is aspirated into said outlet leg at a controlled rate.”

It is the presumption of law that each element of a combination claim is old.

*Wham-O-Mfg. Co. v. Paradise Manufacturing Co.*,  
327 F. 2d 748 (C.A. 9, 1964);

*Aetna Steel Products Corporation v. Southwest  
Products Company*, 282 F. 2d 323 (C.A. 9, 1960);

*Pointer v. Six Wheel Corporation*, 177 F. 2d 153  
(C.A. 9, 1949);



*Oliver United Filters, Inc. v. Silver*, 206 F. 2d 658  
(C.A. 10, 1953).

An invention directed to a method is independent of the apparatus used to carry out that method and that the apparatus may be old separately considered is of secondary consequence and does not invalidate the process or method patent.

*Fermentation Co. v. Maus*, 122 U.S. 413, at 428.

The mere existence of a trap or that that trap might be made useful for carrying out the particular process of the Quick patent is not anticipatory of the method claim of this patent.

*Carnegie Steel Company v. Cambria Iron Company*,  
185 U.S. 403, at 424-425.

See also:

*Risdon Iron and Locomotive Works v. Medart*,  
158 U.S. 68, at 75-76;

*In re Walch et al.*, 87 F. 2d 511, at 513 (C.C.P.A.  
1937): and

*City of Milwaukee v. Activated Sludge*, 69 F. 2d 577,  
at 588 (C.A. 7, 1934).

Appellees in their brief assert on page 3 thereof, Point 1, that plaintiffs have not defined the invention of the Quick patent. In this respect appellees have ignored completely the statement of invention set forth by appellants in their Opening Brief, pages 9 and 10, under the heading "The Quick Concept". However, if there can be any question with respect to this matter the invention made by Quick and as defined by the claims of the Quick patent here in suit resides in a method and apparatus for defrosting the evaporator of a refrigeration system which employs hot gas as a medium of delivering heat

to the evaporator to melt the frost and wherein the refrigerant which leaves the evaporator after defrosting as both a liquid and gas is in the suction or low pressure line separated into liquid and gaseous refrigerant wherein the flow of the liquid refrigerant is delayed or held from free flow to the compressor and is then metered back into the free flowing gaseous refrigerant at a controlled rate so that it is in effect returned to the gaseous refrigerant as more or less of a fog or in such dispersion that the compressor can handle and will handle the gaseous refrigerant in which the liquid refrigerant is dispersed in small quantities so that during the re-compression cycle of the refrigerant the total refrigerant passes through the compressor. The dispersion of the liquid refrigerant in this manner into the gaseous refrigerant enables the compressor to operate without damage to the compressor and without liability of breakdown and enables the system to operate under all conditions which must be met by such refrigeration apparatus. The Quick patent in suit is the first and only disclosure that the system of hot gas defrost can be operated without the addition of heat to the liquid refrigerant leaving the evaporator by separating the gaseous and liquid refrigerant between the evaporator and the compressor as the sole means of returning the combined refrigerant, liquid and gas, to the compressor and obviates what Quick sought to do as admitted in the appellees' brief to avoid the purchase of an expensive re-evaporator, i.e., the Kramer Company expensive Thermobank system (Appellees' Brief, page 23):

“Quick apparently did not want to spend money for a ‘Thermobank’ so he built his own trap and was proud that: \* \* \*”

A fair rating of all of the prior art relied upon by the appellees will demonstrate to this Court that the art

believed before the Quick invention that when the hot gas system of defrosting was employed it was necessary to effect complete re-evaporation of the liquid refrigerant in the suction line between the evaporator and the compressor before the refrigerant was returned to the compressor. Quick first discovered and first taught this art that all of the consequent expense of such re-evaporation of the liquid refrigerant could be successfully avoided by separating the gaseous refrigerant from the liquid refrigerant in the suction line and then at a controlled rate returning the liquid refrigerant to the gaseous refrigerant and that this could be accomplished without the aid of or consequent expense of effecting re-evaporation of the liquid refrigerant to any substantial degree. In the Quick method and apparatus the separated liquid refrigerant is returned to the suction line without substantial re-evaporation during its separation.

The proof that this constituted invention and is the mode of operation and method followed through the medium expedient utilized by the art subsequent to Quick's teaching becomes obvious from the proof that in the thaw system used by the defendants some fifty odd pounds of liquid refrigerant would be returned to the compressor without utilizing the Quick invention. This fact was admitted by defendants' Chief Engineer, Mr. Nussbaum, in the process of his cross-examination as particularly set forth by appellants in their Opening Brief, pages 61 to 63, inclusive.

The Quick invention was not believed to be an operative suggestion. Its disclosure to Kramer Trenton, when Quick sent his application to them, was ignored. Recold, appellant, was so skeptical that it spent months in field testing. Kramer Trenton, the real party here in interest, began copying the Quick invention after seeing the Recold demonstration at the Atlantic City Industry



Show [Tr. 1241 to 1248]. This copying followed the Kramer Trenton asserted attempt to supplement the Thermobank system with the closed trap of the Nussbaum patent. The question obviously unanswered by the defendant's (Kramer Trenton's) testimony here is, would there be the Quick system, which is not dependent on evaporation of the liquid refrigerant, without the Quick invention? Kramer Trenton did not produce it; no one else produced it. It remained for Mr. Quick, a field service man, to make the discovery from necessity. Quick taught the art that in a hot gas defrost system he could separate the liquid refrigerant out and then meter it back into the gaseous refrigerant, that during the separation there was no substantial re-evaporation, and that the hot gas defrost system could thus operate under all conditions, without liability of breakdown. This was contrary to the beliefs of the published art as demonstrated in our Opening Brief. It was contrary to the published statements of Mr. Nussbaum and Mr. Kramer of Kramer Trenton Co. It was so contrary to the beliefs of this art that Kramer Trenton only went to the Quick invention after observing its demonstration. Copying of this character is one of the most reliable tests of invention.

*The Filtex Corporation v. Amen Atiyek,*  
216 F. 2d 443, 444-445 (C.A. 9, 1954);

*The Troy Company v. Products Research Company,*  
339 F. 2d 364, 366.

### **The Patent Art Relied Upon Does Not Disclose the Quick Invention**

As to the published art, i.e., the prior patents and the publications, this Court has repeatedly stated that it is capable itself to judge of the sufficiency of their teach-

ing. Particularly is this true of a non-complex invention as is here before this Court.

In the first instance, to be anticipatory, this prior teaching must be that the very old hot gas defrosting system could be made operative under industry conditions without re-evaporation of the liquid refrigerant. There simply isn't any such teaching prior to the Quick invention. In this respect the facts of this case are strictly comparable to those before the Supreme Court in *Carnegie Steel Company v. Cambria Iron Company*, 185 U.S. 403. After reviewing completely the evidence the Court stated in quoting from *Loom Co. v. Higgins*, 105 U.S. 580, 591:

“. . . ‘But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. . . . Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention’.” (446)

A trap used under other conditions, not of hot gas defrosting, and even if used as a supplement to a re-evaporating system, is just not the teaching of Quick.

*Trabon Engineering Corporation v. Dirkes, et. al.*,  
136 F. 2d 24 C.A. 6 (1943).

Prior structures which by modification might be made to perform functions of a later patented device are not anticipations where not designed, adapted to nor used for such functions, and prior patents cannot be modified or reconstructed in the light of the subsequent invention to build up an anticipation.

*Silver-Brown Co. v. Sheridan et al.*, 71 F. 2d 935, C.A. 1 (1934), *Cert. denied* 293 U.S. 590, 79 L. Ed. 685 (1934);

*Young Radiator Co. v. Modine Mfg. Co.*, 55 F. 2d 545, C.A. 7 (1932);

*H. W. Peters Co., Inc. v. MacDonald*, 59 F. 2d 974, C.A. 2 (1932), *Cert. denied* 287 U.S. 659, 77 L. Ed. 569 (1932);

*Trico Products Corporation v. Apco-Mossberg Corporation*, 45 F. 2d 594, C.A. 1 (1930);

*Gordon Form Lathe Co. v. Walcott Mach. Co.* 32 F. 2d 55, C.A. 6 (1929);

*Payne Furnace & Supply Company v. Williams-Wallace Co.*, 48 USPQ 575, 117 F. 2d 823, C.A. 9 (1941), *Cert. denied*, 49 USPQ 756, 313 U.S. 573, 85 L. Ed. 1530;

*Diamond Power Specialty Corporation v. Bayer Co.*, 13 F. 2d 337, C.A. 8 (1926);

*Naylor et al. v. Alsop Process Co.*, 168 F. 911, C.A. 8 (1909);

*In re Hummer*, 113 USPQ 66, 241 F. 2d 742 (1957);

*Steiner Sales Co. v. Darman Mfg. Co., Inc. et al.*, 33 F. Supp. 422, D.C. N.Y. (1940).

It is not alleged and it is not found by the lower court that the Quick invention, in its entirety, is found either



in the prior patents or in the publications. This Court has said many times that where the proof lies in written documents the findings based thereon are not conclusive, but that this Court is able to read those writings and draw its own conclusions therefrom. In this case that is what appellants are requesting this Court to do. These writings, i.e., patents and publications, read completely, and not as to excerpts thereof taken out of context, clearly teach that re-evaporation must be had before reaching the compressor. Mr. Nussbaum's testimony, read completely, and not by excerpts taken out of context, also affirms the belief of the prior art. We are not here setting forth excerpts of that testimony because to do so may mislead. The Nussbaum testimony which is most demonstrative is found at Tr. 1059, 1062, 1068, 1070, 1071, 1072, 1094, 1097, inclusive. Consider this testimony in the light of Mr. Nussbaum's contemporaneous writings, and those writings of Mr. Kramer which he edited, as set forth in our Opening Brief. The entire review of this material will lead to one conclusion and that is had not Kramer Trenton copied the Quick demonstration unit, and were it not for the Quick invention, the entire art would still follow the teaching of the necessity of total re-evaporation, i.e., that addition of heat was a necessity, that un-evaporated liquid refrigerant could not be returned to the compressor in a hot gas defrost system. Where there is total absence of the teaching of the operation with its ultimate result in the art, that art cannot be said to negative invention. So that tested by the premise "that which infringes if later anticipates if earlier" (*Killefer Mfg. Co. v. Dinuba Associates, Limited*, 67 F. 2d 362 (C.A. 9, 1933)), it is obvious that the invention of the Quick patent is not found in the art. The Nussbaum, Kettering, Hart, and all the other patents relied upon by appellees, each of which fails to teach the

mode of operation of or to disclose the result of Quick, would not infringe the Quick patent.

Where there is no teaching of the solution to the problem the art does not negative invention.

*Williams Iron Works Co. v. Hughes Tool Co.*, 109 F. 2d 500 (C.A. 10, 1940).

The claim that Quick's installation made in Emery's store (Appellees' Brief, page 22) and in other installations in Oregon is anticipatory, is answered completely by Quick's testimony of his experimentations, and further by the series of continuing patent applications filed by Quick, which are continuations of each other. That Quick made only experimental tests, made no charge therefor, continuously observed the operations, changed the installation to remove the heat coils therefrom, and that plaintiff Recold's continued experimentation and testing to within the statutory period of the filing of the last of the Quick applications, is fully established by this record (Appellants' Opening Brief, page 4). In accordance with 35 U.S.C. § 120, the effective date of the Quick patent is the date of these early applications.

The continued experimentation of Quick to within the critical date of the application for the patent is as stated by Quick with reference to the Emery store in Salem:

"I began to realize that maybe my preconceived ideas that heat was absolutely necessary to effect hot-gas defrosting were not so. I therefore went back to my shop and started experimenting. Since I had another installation going in my home town only a few blocks from our office, in which we were to install two frozen-food cases, I proceeded to construct a more properly engineered accumulator to install on this job as an experiment to see if what I had observed was really true.

Q. and in that regard what did you do?

A. I purchased a Kramer Thermobank properly sized for this job just in case it didn't work. I manufactured the accumulator very much as I described; however, being still not convinced that I did not have to have heat I carefully coiled a coil of copper piping around the total exterior surface of this accumulator, soldered this coil to the surface of the accumulator for good heat exchange effect, and made provisions so that I could run warm water through this pipe during the defrosting process if I found it necessary." [Tr. 203-204].

Further, Mr. Quick testified that he experimented on this hot water heat exchanger for approximately a week using recording equipment. Examination of this recording equipment indicated that this system was defrosting as well as any Kramer Thermobank he had installed. He also turned off the switch, which completely took the exchanger out of service, and could determine very little difference in operation from the recording charts.

Furthermore, Mr. Quick testified that at this second market he recorded the operation for about three weeks and returned periodically to inspect the cases to see if ice was forming in the pan or the bottom portion of the cases. During this time neither customer knew of this experimentation, and it was not until Mr. Wile and Mr. Jarvis came to Eugene to visit this job that any one knew that there was anything installed in their store different than the normal installations [Tr. 205].

Further experimentation was carried on at a third installation where vapots were installed and experimented on for two months. The results of these tests indicated that meat shrinkage was less than half of what it had previously been and the bloom condition of his meat was substantially improved [Tr. 208].



The continued experimentation by Quick is clearly within the law a lawful effort to bring the invention to perfection within the ruling of the Supreme Court in *Elizabeth v. Pavement Co.*, 97 U.S.C. 126, and as this ruling is followed in *Amerio Contact Plate Freezers, Inc. v. Belt-Ice Corporation et al.*, 316 F. 2d 459 (C.A. 9, 1963). See also:

*Andrews v. Hovey*, 123 U.S. 267, and

*Smith and Griggs Mfg. Co. v. Sprague*,  
123 U.S. 249 (1887).

The claim is made by appellees that the invention of Quick was obvious as a matter of law as stated by this Court in *National Sponge Cushion Co. v. Rubber Corporation*, 268 F.2d 731, C.A. 9 (1961), 128 USPQ 320. The facts are that the Quick invention is not taught by the references. The Hart article relied upon clearly teaches the necessary use of heat to re-evaporate the liquid refrigerant.

At page 31 of Appellees' Brief it is stated that plaintiffs misrepresented the teachings of Hart in Exhibit Q by stating that Hart teaches that no trap should be used in the suction line, that the use of the word "trap" refers to unintentional trapping of the liquid refrigerant in the refrigerated space.

Appellants assert that Hart does, however, teach that:

"The remedy in this case is an accumulator in the suction line arranged to stop the slugs of liquid, *allow them to re-evaporate*, and at the same time provide for the return of oil to the compressor."  
(Hart, Ex. Q, p. 247, Appellees' Brief, page 31).  
(emphasis ours)

Hart teaches re-evaporation, the very problem which Quick avoided. Hart in this teaching is diametrically

opposed to Quick, and this is tacitly admitted by appellees in their brief.

Furthermore, the Hart article refers to small commercial systems where it may be unnecessary to make special provisions for re-evaporating the refrigerant when high speed compressors are used. The author stated at p. 248, col. 2, Exhibit Q:

“ . . . The author has found it imperative to protect the newer types of high speed compressors against slugging of refrigerant by one of several devices, especially in low temperature fixtures.

The most simple device known to the author is a combination heat exchanger and accumulator. . . . It amounts to an enlarged section of suction line with a portion of the liquid line coiled up inside to simulate a heat exchanger during the refrigeration cycle but not during defrosting. The function of this device is to trap any slugs of liquid before they reach the compressor, regardless of the rate at which hot gas is metered into the evaporator and *retain this refrigerant until it has ‘boiled off’ from the combined action of the suction and the heat pick up through the wall of the device.* In a real sense it acts as insurance against compressor trouble, *especially when placed outside of the refrigerated area, or in such a position within the refrigerator that it can pick up some heat.*” (emphasis added)

The combined action referred to is the exchange of heat from the walls of the device and the suction, or more properly the reduction from atmospheric or internal pressure which in turn lowers the volatilization point of the liquid refrigerant and aids in “boiling off” this refrigerant.

Exhibits P and Q are their own best evidence and speak for themselves, and reading of these articles in light of the Quick disclosure clearly demonstrates that there cannot be any possible anticipation.

**There is No Adequate Proof that  
Surge Tanks Were Ever Used**

In the *Barbed Wire Patent Case*, 143 U.S. 275, 284, the Supreme Court condemned the offer of proof of prior anticipation through oral testimony alone. No person other than Nussbaum testified before the Court as to the existence of any such system and Mr. Nussbaum clearly failed to include any such system within the disclosures of any of the patent applications which he filed subsequent to this alleged use.

With regard to Mr. Nussbaum's actual testimony he:

“ . . . made a recommendation to the management of the Company that an additional trap be installed between the outlet 4 of the Thermobank and the compressor suction inlet, which would serve to intercept excess liquid that would be overflowing the Thermobank, separate that excess liquid from vapor, and return only vapor to the compressor and arrest the excess liquid until it might have been re-evaporated by the warmth of the surrounding air. . . .”  
[Tr. 1061];

and further at 1067 Mr. Nussbaum testified:

“ . . . that was the purpose of the surge tank, to trap liquid refrigerant during defrosting and to permit only passage of vapor back into the suction line.”

Therefore, the surge tank cannot be anticipatory of the Quick invention nor of the Recold vapot. Mr. Nuss-



baum testified that these surge tanks or the use thereof was “recommended” to the management of Merrimac Locker Plant in Exeter, New Hampshire, and Morrill’s Food Locker in Deering, Maine. Drawings were produced from Mr. Nussbaum’s files, but there is no corroborated testimony nor documents to either show that these surge tanks were in fact used or had ever been used or installed in any installation.

### **The Purported Dilemma of Without Substantial Evaporation**

The appellees attempt to cloud the issues in this case by misrepresenting the facts, testimony, specification and claims of the patent in suit.

However, in their brief appellees admit that in a hot gas defrost system that liquid refrigerant returning to the compressor without substantial re-evaporation would avoid the prior art (Appellees’ Brief, p. 41).

Then appellees attempted to mislead this Court by partial quotation from Mr. Quick’s testimony at page 337 of the transcript.

“Q. Would you say that the liquid in these prior installations, in Emery, Orr’s and McKay jobs would have substantially re-evaporated when the refrigerant was being returned to the compressor?

“A. I would say so.

“Q. Would your system have operated satisfactorily when you installed the trap if the refrigerant was without substantial re-evaporation?

“A. It would not have. I would have to correct that statement slightly, because I am assuming in your question that you are assuming that the trap

were not separating out the liquid. I also stated that I placed the traps in various positions in the suction line so that I could test whether enough liquid was being returned at fast enough rate to cause damage to the compressor and I placed in one of these pictures that you have the trap directly in front of the compressor, where the liquid would no doubt have come into the compressor very directly, on purpose to test this.

“Q. Are you telling us that with your trap, then, the liquid in this last installation where you just put the trap in the suction line just prior to the compressor, are you saying now that in that installation the refrigerant was being returned to the compressor without substantial re-evaporation?”

“A. It was being returned to the suction valve of the compressor with much less re-evaporation than it would have been at a further distance.

“Q. If the trap was at a further distance in the suction line from the compressor, then the suction line would have operated as a re-evaporator to evaporate a refrigerant, is that correct?”

“A. It would have evaporated more of it, at least.”

[Tr. 337-338.]

The specification of the Quick patent (column 3, lines 44-48, and column 4, lines 2-6) cannot be read without the light of the claims. The specification teaches what probably happens in the line returning to the compressor is that at any given instance of time, some liquid will evaporate. The claims describe what happens in the accumulator, as previously pointed out in this brief. As to any dilemma in this respect, appellees' arguments are unfounded and wholly without merit.

In this case appellees have not only seen fit to assert, without in any way demonstrating the basis of such assertion, that appellants have sought to misrepresent the facts to this Court, but have resorted to personal vindications, which are likewise groundless. The misrepresentations made to the Patent Office concerning the operation being dependent on metering the liquid refrigerant into gaseous refrigerant *without* substantial re-evaporation are proven to be factually correct. Mr. Nussbaum so testified with reference to the defendants' operation [Tr. 1558, Vol. 13—Appellants' Opening Brief, page 61]. That the patents and publications of the art so taught is fully established in our Opening Brief, pages 42 to 60.

### Conclusion

It is here shown that Mr. Quick taught the art that the very old hot gas defrost system could be operated without liability of destruction of the compressor, and without re-evaporation of the liquid refrigerant. He taught that the large volume, fifty pounds of liquid refrigerant, could be metered at a controlled rate into the suction line with the gaseous refrigerant, and that the liquid so returned in metered quantities would not damage the compressor. The practice of the art and belief of using heaters and re-evaporators in the suction line, a very expensive and not fully reliable operation, was avoided. Quick overcame this problem in face of the teachings and beliefs of the industry. He, Quick, a refrigeration service man, did what the engineers in this art had failed to accomplish. The Quick patent should be sustained. This was a problem of long standing, the art had long sought the solution, and Quick's very simple solution has every element of invention.

*Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co.*, 117 F. 2d 823, C.A. 9 (1941);

*Safety Car Heating & Lighting Co., Inc. v. General Electric Co. et al.*, 155 F. 2d 937, C.A. 2 (1946);

*Pointer v. Six Wheel Corporation*, 177 F. 2d 153 C.A. 9 (1949);

*Wham-O-Mfg. Co. v. Paradise Manufacturing Co.*, 327 F. 2d 748, C.A. 9 (1964);

*Aetna Steel Products Corporation v. Southwest Products*, 282 F. 2d 323 C.A. 9 (1960).

Respectfully submitted,

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By LEWIS E. LYON

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### **Certificate**

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and in my opinion the foregoing brief is in full compliance with those rules.

LEWIS E. LYON

